nearly every instance where Verizon cites to the RBOC/IXC merger orders, it points to the FCC's discussion of *retail* competition for enterprise services.[14] For example, in the Verizon/MCI merger order, the FCC merely concluded that the loss of legacy MCI in the retail special access market in Verizon's region would be ameliorated by the presence of other *retail* competitors.[15] Importantly, the RBOC/IXC merger orders reached no conclusions regarding the competitiveness of the market for transmission facilities in any particular geographic markets.

The parts of the Verizon/MCI merger order not cited by Verizon make clear that Verizon controls the only end-user connections serving the vast majority of commercial buildings in its territory. For example, the FCC found that Verizon can "access all or virtually all of the buildings and transport routes in its territory," (*Verizon/MCI Merger Order* ¶ 30), and that "[t]he record also indicates that, for many buildings, there is little potential for competitive entry, at least in the short term. As the Commission has previously recognized, carriers face substantial fixed and sunk costs, as well as operational barriers, when deploying loops, particularly where the capacity demanded is relatively limited...." *Id.* ¶ 39. In any event, the Justice Department's conclusion that Verizon controls the only last-mile access to the "vast majority of commercial

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[14] *See, e.g., NY MSA Petition* at 17 (citing Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 56 (2005) ("*Verizon/MCI Merger Order*")) ("[R]etail competition for enterprise customers is 'strong' and will remain so 'because medium and large enterprise customers are sophisticated, high volume purchasers of communications services that demand high-capacity communications services, and because there [are] a significant number of carriers in the market.'").

[15] *See Verizon/MCI Merger Order* ¶ 78 ("In conclusion, although we find overlap between the Applicants' enterprise operations, we do not find that the increase in concentration resulting from the merger is likely to result in anticompetitive effects in [the retail enterprise] market. As discussed above, the record shows that, for all groups of business customers, there are multiple services and multiple providers that can meet their demand.").

buildings in its region" forecloses reliance on the MCI merger analysis as supporting the instant forbearance petitions.

B. Verizon Has Not, And Cannot, Demonstrate That Facilities-Based Competition From Intramodal Competitors In Any Wire Center Within The Six Markets Is Sufficient To Justify Forbearance.

The available evidence concerning the extent to which intramodal competitors,[16] considered separately from intermodal competitors, have or could deploy their own loop or transport facilities confirms that continued availability of unbundled DS-0, DS-1 and DS-3 loops and DS-1 and DS-3 transport is necessary to ensure that business services are offered on terms and conditions that are just, reasonable and not unjustly or unreasonably discriminatory. This is particularly true with regard to the specific cities for which Verizon seeks forbearance.

1. The Joint Commenters' And Other Intramodal Competitors' Experiences Demonstrates That They Are Unable To Deploy The Loops Or Transport Facilities For Which Verizon Seeks Forbearance

The Joint Commenters' attempts to self-deploy loop and transport facilities confirms that there is no basis for further reducing the areas in which Verizon is still required to unbundle DS-0, DS-1 or DS-3 loops or DS-1 or DS-3 transport. TWTC's experiences are especially probative, since TWTC is arguably constructing end user connections at a faster pace than any intramodal competitor in the market today. Of the **[proprietary begin] [proprietary end]** buildings served on-net by TWTC's fiber in the New York MSA, **[proprietary begin] [proprietary end]** is characterized by demand for telecommunications service at the level of a single DS-1. Of TWTC's **[proprietary begin] [proprietary end]** on-net customers demanding only a single DS-1, all are located in buildings to which TWTC is serving another customer with much higher

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[16] *See Triennial Review Order*, Separate Statement of Kathleen Abernathy at 3 (defining intramodal competition as "competitive LECs using their own facilities and incumbents' loops and subloops").

levels of demand. Indeed, TWTC almost always requires multiple DS-3's of demand to justify loop construction. TWTC is able to serve, nationwide, only 26.7[17] percent of its customer locations on-net, while it is only able to serve **[proprietary begin] [proprietary end]** percent on-net in New York City because of obstacles unique to the New York MSA.[18]

Competitors that concentrate on serving only customers that demand one DS-3 of capacity or less are never able to construct their own loops. One Communications provides no more than a single DS-3 of capacity to the vast majority of its customers and it serves most of its customers with a single DS-1 or multiple DS-1s of capacity. These facilities generally do not offer One Communications sufficient revenue opportunities in any of its Verizon markets to justify loop deployment. Accordingly, it is in most cases not economically feasible for One Communications to deploy any loop facilities in the Verizon markets in which it competes, including Philadelphia, Providence, New York and Boston. Similarly, it is never economically feasible for Cbeyond to deploy its own loop facilities because its highest level of service, at 3 DS-1s, does not offer sufficient revenue opportunities to compensate for the costs of loop facilities.[19] One Communications and Cbeyond have previously stated that neither company is able to serve such customers if forced to rely exclusively on special access facilities.[20]

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[17] *See* Time Warner Telecom, Inc., SEC Form 10-Q Quarterly Report for the Period Ended September 30, 2006, at 27 (filed Nov. 9, 2006).

[18] This disparity is due to the extremely high cost of fiber loop deployment in dense urban areas, especially in New York City. The comparatively high labor costs and right-of-way access fees, as well as comparatively long delays in obtaining permission to begin construction make facilities deployment especially difficult in New York City despite high revenue opportunities.

[19] *See* Cbeyond, *Cbeyond® BeyondVoice™*, http://www.cbeyond.net/business/packages.htm.

[20] *See* Declaration of Robert J. Shanahan on behalf of Conversent ¶ 16, attached as App. H to Joint Comments of ALTS *et al.*, WC Dkt. Nos. 04-313 *et al.* (Oct. 4, 2004) ("...if ILECs were not required to sell loops at TELRIC regulated prices, it is extremely unlikely that Conversent

The Joint Commenters' experience is typical. Nearly every one of the intramodal competitors cited by Verizon as competing for enterprise customers in the six MSAs in question continues to rely heavily on Verizon's facilities and can only deploy loop facilities to customers in extremely limited circumstances. In line with the FCC's findings in the *TRRO* and the experience of the Joint Commenters, these carriers cannot deploy loop facilities at the DS-1 level and, in most cases, demand multiple DS-3s of capacity to justify deployment. Moreover, as they indicate, many of these carriers rely heavily on UNEs, not special access facilities. With the exception of TWTC and PAETEC, intramodal carriers operating in the six markets at issue purchase special access only where UNEs are unavailable due to the operation of the *TRRO* impairment triggers or where Verizon rejects UNE orders due to the purported absence of facilities or some other excuse.[21] If forced to rely exclusively on special access facilities, many

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[now part of One Communications] would be able to purchase access to ILEC loops at process that would permit Conversent to provide competitive DS-1 level services.); Declaration of Rainer Gawlick on behalf of Lightship ¶ 13, attached as App. B to Joint Comments of ALTS *et al.*, WC Dkt. Nos. 04-313 *et al.* (Oct. 4, 2004) ("Lightship [now part of One Communications] commonly must pay 184% to 1,576% more to purchase connections to buildings as DS-1 Special Access versus DS-1 or DS-3 UNEs....These kinds of cost increases will have a significant negative impact on our performance."); Declaration of Richard Baatelan on behalf of Cbeyond ¶ 7, attached as App. C to Joint Comments of ALTS *et al.*, WC Dkt. Nos. 04-313 *et al.* (Oct. 4, 2004) ("Because of its high price and its provisioning characteristics, special access does not serve as a viable means of entry. ILEC special access tariff rates are too high for Cbeyond to make a profit by either reselling bare DS-1 transmission or by using ILEC special access as an input into Cbeyond's own retail offerings. Moreover, these rates have been steadily increasing.").

[21] Indeed, the experience of many of these carriers with respect to the BOCs and specifically Verizon's unlawful manipulation of the UNE rules formed the basis for the FCC to reject the use of special access as a substitute for UNEs in the *TRRO*. *See, e.g.*, *TRRO* ¶ 64 ("In short, in many cases, it appears that carriers expected to transition to UNEs – and pursued business models relying on this eventuality – but committed to long-term special access contracts in the interim.").

(probably most) of these carriers would have to exit the market. The relevant intramodal competitors' market experiences are as follows.

- AT&T:
  - AT&T cannot serve 2 DS-3s or less of capacity unless the location is within 88 feet of its network splice point. *See* AT&T Comments, WC Dkt. Nos. 04-313 *et al.*, at 36 (filed Oct. 4, 2004).
  - AT&T can only reach 10 percent of its target market with its own loop facilities. *See* AT&T *ex parte* presentation, CC Dkt. No. 01-338 (Jan. 7, 2003).
  - Where AT&T must rely on ILEC special access as an input, it cannot offer Ethernet service profitably at retail. AT&T Comments, WC Dkt. Nos. 04-313 *et al.*, Attach. B, Benway *et al.* Declaration ¶ 103 (filed Oct. 4, 2004).
- Bayring:
  - "Overall, Bayring serves only approximately 5% of lines completely over self-provisioned facilities..." Declaration of Steven A. Wengert on behalf of BayRing, attached to Comments of ATX *et al.*, WC Dkt. Nos. 04-313 *et* al., ¶ 15 (Oct. 4, 2004).
  - "Bayring does not use special access circuits more widely because the pricing makes them uneconomic except as a short-term transition device." *Id.* ¶ 16.
- Broadview
  - Broadview has only built fiber transport to 20 percent of its collocations. Sommi Declaration on behalf of Broadview, attached to Joint Comments of the Loop and Transport CLEC Coalition, WC Dkt. Nos. 04-313 *et al.*, ¶ 4 (filed Oct. 4, 2004).
  - It is only economical for Broadview to deploy fiber transport at capacities in excess of 3 DS-3s. *Id.* ¶ 6.
  - If Broadview converted its network to special access, its transport and DS-1 loop costs would increase by approximately 225 percent. *Id.* ¶ 15.
  - Broadview only uses special access when orders are rejected by Verizon for "no facilities." *Id.*
- Broadwing

- It is never economical for Broadwing to deploy its own loop facilities. Broadwing WC Dkt. 05-25, at 11 (filed June 13, 2005).
- The ILECs maintain a near monopoly over the DS-1 loop facilities that Broadwing demands. *Id.*

➢ Cavalier

- Construction of loops in urban areas is often prohibitively expensive and Cavalier will only construct such facilities if there is demand for "several DS-3 circuits" at a particular location. ALTS *et al.* Comments, App. I, Declaration of Brad A. Evans, WC Dkt. Nos. 04-313 *et al.*, ¶ 20 (filed Oct. 4, 2004).
- Cavalier experiences rejections for UNE orders from Verizon at a rate of 23 percent for DS-1 loops and 79 percent for DS-3 loops. *Id.* ¶ 22.

➢ Covad

- Covad has not deployed DS-1 loops and instead relies exclusively on the ILEC for such facilities. Covad Comments, Joint Declaration of Stephan Derodeff *et al.*, WC Dkt. Nos. 04-313 *et al.*, ¶ 44 (filed Oct. 4, 2004).
- Covad only purchases special access when UNEs are unavailable and based on the presumption that these circuits can quickly be converted to UNEs. Covad Reply Comments at 34. Typically, 35 to 40 percent of DS-1 UNE of Covad's orders are rejected by Verizon because facilities are "unavailable." Joint Letter of Covad *et al.*, CC Dkt. Nos. 01-338 *et al.*, at 2 (Aug. 9, 2004).
- Covad cannot profitably provide DS-1 services to business customers if forced to purchase all of its DS-1 services as special access. Special access prices are generally 150 to 250 percent higher than UNE prices. Covad Comments, Joint Declaration of Stephan Derodeff *et al.*, WC Dkt. Nos. 04-313 *et al.*, ¶ 45 (filed Oct. 4, 2004).
- In the NY MSA, the monthly rate for DS-1 transport is approximately 400 percent higher than the rate for DS-1 UNE transport. *Id.* ¶ 51.

➢ Level 3

- Level 3 "finds it largely impossible to find viable alternatives to ILEC special access services." Level 3 Opposition at 10-11.

➢ NEON

- AT&T declarant Lee Selwyn states that "(NEON) indicated that, despite its metro fiber ring network, it does not usually provide local

loops...NEON states that it does not provide end-user loop connectivity." Reply Comments of AT&T, WC Dkt. Nos. 04-313 *et al.*, Attach. D, Selwyn Declaration ¶ 22 (filed Oct. 19, 2004).

- PAETEC
  - PAETEC leases transmission facilities almost exclusively from the ILECs because there are few other wholesale alternatives. Comments of PAETEC, WC Dkt. No. 05-25, at 3 (filed June 13, 2005).
  - PAETEC is reliant on ILEC special access for 95 percent of its loops. *Id.* at ii.
  - Since the RBOC/IXC mergers, the market for local transmission services in Verizon's territory has become less competitive. AT&T is not competing as aggressively in the Verizon region as it had prior to its merger with SBC. Comments of PAETEC, WC Dkt. No. 06-74, at 6-7 (filed June 5, 2006).
- Sprint
  - As of the end of 2004, "Sprint relied upon the RBOC for almost 95 percent of its DS-1 circuits and 83 percent of its DS-3 circuits." Comments of Sprint, WC Dkt. No. 05-25, at 7 (filed June 13, 2005).
- XO
  - Less than 25 percent of XO's DS-1 circuits are special access while more than 75 percent are purchased as UNEs. Tirado Declaration ¶ 44, attached to Joint Comments of the Loop and Transport CLEC Coalition, WC Dkt. No. 04-313 (filed Oct. 4, 2004) ("*Tirado Declaration*").
  - If XO were forced to purchase exclusively special access DS-1s, it could not compete. XO Emergency Petition for Expedited Determination that CLECs are Impaired Without DS-1 UNE Loops, WC Dkt. Nos. 04-313 *et al.*, at 30 (Sept. 39, 2004) ("*XO DS-1 Petition*").
  - Even under term and volume commitment plans, XO must pay 20 percent to 300 percent higher for special access DS-1 and DS-3 loops than for UNEs. *Tirado Declaration* ¶ 42.
  - It is almost never economic for XO to construct its own DS-1 facilities. *Id.* ¶ 21.
  - XO has rarely been able to purchase DS-1 and DS-3 loop facilities from other CLECs. In XO's experience, CLECs offer DS-1 and DS-3 loops on a wholesale basis to fewer than five percent of the buildings that XO seeks to serve. *Id.*

- It is never economic for XO to deploy DS-1 transport. *Id.* ¶ 35.
- When XO orders special access, it never does so by choice, but it is often forced to do so because of Verizon's "no-facilities available" policy. *XO DS-1 Petition* at 31.
- Verizon makes XO wait 90 days to convert a special access DS-1 to a UNE and one year to convert a special access DS-3 to a UNE. *Tirado Declaration* ¶ 47.

➢ Xspedius (now part of TWTC)

- "It is almost never economic for Xspedius to construct its own DS-1 wireline loop facilities." Declaration of James C. Falvey ¶ 26, attached to Joint Comments of the Loop and Transport CLEC Coalition, WC Dkt. Nos. 04-313 *et al.* (filed Oct. 4, 2004).
- Xspedius generally requires at least 3 DS-3s of demand to construct a loop. *Id.* ¶ 23.
- It would never be economic for Xspedius to deploy DS-1 transport facilities and Xspedius has never done so. *Id.* ¶ 29.

2. Verizon Provides No Evidence That Intramodal Competitors Are Able To Deploy The Loops Or Transport Facilities For Which Verizon Seeks Forbearance

Notwithstanding the overwhelming evidence to the contrary, Verizon attempts to argue that intramodal competitors' purported success in deploying loops and transport facilities in the six urban areas in which it seeks forbearance demonstrates that unbundled loops and transport are no longer needed to ensure that business customers receive service at rates, terms and conditions that are just, reasonable and not unreasonably discriminatory. But this is not so. The information supplied by Verizon in support of this assertion simply cannot support the weight of its desired relief.

Most obviously, because the data that Verizon submits is either provided on an MSA-wide basis or on the basis of unidentified wire centers, it is generally not possible to determine the extent to which the intramodal facilities in question are located in wire centers in which Verizon has already been relieved of unbundling obligations due to the operation of the *TRRO*

impairment triggers. Moreover, there are many such wire centers in the six MSAs at issue. Overall, the six MSAs that are subject to Verizon's petitions have a much higher concentration of wire centers in which some form of loop or transport has been eliminated by operation of the impairment triggers than is the case in the nation as a whole. A comparison of the wire centers in the six MSAs at issue listed in Verizon's tariff for pricing flexibility in each of the six MSAs with Verizon's latest list of wire centers no longer subject to unbundling[22] shows that, of the 576 wire centers in the six MSAs, (1) DS-1 loops are unavailable in 18 or 3.13 percent of the total wire centers, and (2) DS-3 loops are unavailable in 32 or 5.56 percent of the total wire centers. This is well above the percentage of wire centers for which loops are unavailable in the nation as a whole. By contrast, former Chairman Powell indicated that 99 percent of DS-1 loops would remain available as UNEs under the *TRRO* triggers.[23] With respect to transport, Tier 1 wire centers comprise 89 or 15.5 percent of wire centers in the six MSAs and Tier 2 wire centers comprise 47 or 8.16 percent of wire centers in these six MSAs.[24] By contrast, nationally, Tier 1 wire centers make up 5.4 percent of all RBOC wire centers (*see TRRO* ¶ 115) and Tier 2 wire centers make up 3.2 percent of all RBOC wire centers (*see id.* ¶ 119). Accordingly, to the extent that the six MSAs exhibit higher levels of facilities deployment than most markets nationwide, this deployment is already taken into account through the extensive regulatory relief that Verizon has received by operation of the *TRRO* triggers.

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[22] *See Verizon's Wire Centers Exempt from UNE Hi-Cap Loop and Dedicated Transport Ordering* (Jan. 24, 2007), at http://www22.verizon.com/wholesale/attachments/verizonwirecentersexempt.xls (last visited Mar. 5, 2007).

[23] *See Unbundled or Unplugged? The UNE Order*, Telecom Policy Report (Dec. 15, 2004).

[24] Any wire center that meets the Tier 1 trigger also meets the Tier 2 trigger.

In light of the extensive unbundling relief that Verizon has already received in the six MSAs, no further relief is necessary or appropriate. Indeed, to grant Verizon further relief via the forbearance mechanism undermines the careful balance that the Commission struck in the *TRRO*. That balance already takes the level of facilities-based competition (fiber-based collocations) into account in determining whether Verizon must continue to provide high-capacity loops and transport. The FCC's determination was upheld by the Court of Appeals just six months ago, after several attempts to develop a set of unbundling rules that the Court could affirm. Now, Verizon seeks to upset that careful balance through use of the forbearance mechanism. The Commission should reject this attempt and should allow the balance struck in the TRRO to remain in operation.

Indeed, to the extent that it is possible to determine whether the intramodal facilities cited by Verizon are located in specific wire centers, it appears that they are concentrated in those wire centers in which Verizon has been granted unbundling relief pursuant to the *TRRO* triggers. For example, under the *TRRO* triggers, as the map attached hereto as Exhibit A indicates, competitors can no longer obtain unbundled loops or transport in large parts of Manhattan. This is almost uniformly true of the wire centers in the southern portion of Manhattan. As the maps and photographs included in the Verizon petition indicate, **[proprietary begin] [proprietary end]**

Even if Verizon had only submitted its data regarding intramodal competition for wire centers where unbundling rights remain in force, the data submitted by Verizon are poor indicators of intramodal facilities-based competition. Verizon has supplied the exact same types of data and proxies for intramodal competitor deployment (*e.g.*, fiber transport maps, maps showing lit buildings, special access spending data and data regarding CLEC fiber mileage) that

the Commission *explicitly rejected* as "not complete, not representative of the entire industry, not readily confirmable, and aggregated at too high of a level to be informative of market conditions." *TRRO* ¶ 110.

For example, the fiber deployment maps Verizon filed in this proceeding, like those in the *TRRO*, do not show the capacity of competitors' loops (if any) serving lit buildings. As the FCC explained in the *TRRO*, such maps have

> little probative value in an impairment analysis for DS-1 or DS-3 loops. The maps provided...do not specify the capacity of service demanded in particular locations along the competitive routes identified; if those locations require capacity only at multiple DS-3 or higher capacities, and are providing revenues commensurate with those capacities, then the presence of competitive routes is not relevant to the question of whether it is economic to deploy to serve customers at the DS-1 level, or even the single DS-3 capacity level.

Id. ¶ 187.

The transport routes indicated on Verizon's maps are equally unreliable indicators of where competitors are able to economically deploy transport. *See NY MSA Declaration, Exs. 5-6.* Such maps "do not indicate whether carriers operating the fiber depicted are using these facilities to provide local service or merely interoffice transport, long-distance service, wireless service, or some combination of services other than local exchange service." *TRRO* ¶ 188.

For similar reasons, Verizon's assertions regarding the **[proprietary begin] [proprietary end]** of fiber route miles or the number of fiber networks[25] purportedly deployed by competitors in the six MSAs are not probative. As the FCC has held, data regarding the number of fiber route miles is an "unreliable" and "unsuitable" indicator of the level or likelihood of loop deployment. *See id.* ¶ 110. In fact, in defending the *TRRO* before the D.C. Circuit, the FCC

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[25] *See, e.g., NY MSA Declaration* ¶ 10 ("According to Geotel, there are at least 24 known competing carriers that operate fiber networks within the New York MSA, and these networks span at least **[proprietary begin] [proprietary end]** route miles).

estimated that only one fifth of the thousands of transport route miles that the ILECs claimed were concentrated in areas where demand for high capacity facilities was greatest could actually be used to provide local services. *See FCC TRRO* brief at 65. There is every reason to think that Verizon has resorted to the same sort of overcounting in this proceeding.

The characteristics of TWTC's transport network underscore the defects in Verizon's data regarding local transport. The map attached as Exhibit B hereto shows nearly all of the portion of TWTC's NY MSA network that is capable of providing local exchange services. **[proprietary begin] [proprietary end]**

Verizon's reliance on the number of collocators in some subset of wire centers[26] in each of the six MSAs is also inapposite. To begin with, the Commission's impairment triggers already account for the presence of collocators. Pursuant to those triggers, unbundled transport can be eliminated based solely on the presence of collocators. But, the FCC rejected the presence of collocations, on their own, as probative of the ability of competitors to deploy loops. *See TRRO* ¶ 168. It instead relied on a combination of collocations and business access lines in a wire center to determine loop impairment. The FCC's decision not to rely on collocations alone reflects market realities. For example, Cbeyond and One Communications are collocated in **[proprietary begin] [proprietary end]** and 700[27] central offices respectively, yet, as explained,

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[26] *See*, e.g., *NY MSA Declaration* ¶ 49 ("As of the end of December 2005, approximately 40 CLECs are collocated in Verizon's central offices in the New York MSA. These competitors are collocated in a total of **[proprietary begin] [proprietary end]** central offices that reach **[proprietary begin] [proprietary end]** percent of Verizon's retail access lines in the MSA, and approximately **[proprietary begin] [proprietary end]** percent of Verizon's switched business lines in the MSA.").

[27] *See* One Communications, Inc., *Our Network Always Gets High Ratings, at* http://www.onecommunications.com/network/index-network-technology.aspx?TierSlicer1_mtid=12&TierSlicer1_mtt=4&TierSlicer1_mid=8 (last visited Feb. 28, 2007).

it is not possible for either company deploys its own loops. Accordingly, there is no basis for the Commission to rely on collocations alone in a wire center in this proceeding. Furthermore, Verizon does not even provide collocation data on an individual wire center basis, thus preventing a wire center-specific review.

Nor is Verizon's assertion that competitors' reliance on special access *in lieu* of UNEs (*see, e.g., NY MSA Declaration* ¶ 47) remotely supportive of this requested relief. Verizon seeks forbearance from UNEs used to provide local service, since the Commission has already eliminated unbundling requirements for loops and transport facilities used solely to provide interexchange or mobile wireless services. *See TRRO* ¶ 34. But Verizon's data in this proceeding do not distinguish between special access used to provide local service and special access used to provide interexchange service and wireless services. As the FCC has found, "the majority of special access arrangements are used to provide service in the mobile wireless and long distance markets." *See id.* ¶ 64. Qwest has stated that, with respect to the local market, the vast majority of its DS-1 circuits are purchased as UNEs, not special access. *See id.* n.176. In Anchorage, the incumbent, ACS, has stated that almost all special access purchased by competitors is used as an input for interexchange service.[28] Verizon's failure to differentiate between special access used to serve the local market from special access used as an input to provide interexchange and wireless service renders its reliance on this information little more than empty rhetoric.

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[28] *See ex parte* presentation at 5, attached to letter of Karen Brinkman, Counsel, ACS, to Marlene H. Dortch, Secretary, FCC, WC Dkt. 05-281 (filed Dec. 19, 2006).

But even if Verizon were to provide evidence that competitors use special access to provide local service, this would not support its request for forbearance. As mentioned, the Commission has held that special access is simply not a replacement for UNEs for purposes of serving the local market, given that ILECs have the ability to engage in all manner of "abuse" when providing special access (most obviously by unilaterally raising prices) and given that special access prices are constrained by the availability of UNEs. *See id.* ¶ 62. Moreover, the DC Circuit upheld this conclusion as reasonable. *See Covad Communications v. FCC*, 450 F.3d 528, 531 (D.C. Cir. 2006).

Verizon also suggests that competitors that have deployed their own fiber transmission facilities are present in a high percentage of those wire centers that account for **[proprietary begin] [proprietary end]** percent of Verizon's high-capacity special access revenues.[29] Verizon's implication is that, in those markets where competitors purchase large amounts of special access services, they also deploy local fiber facilities. But Verizon neglects to mention that it made a nearly identical argument in the *TRRO*, and the FCC responded that data regarding high concentrations of special access spending is simply duplicative of the *TRRO* impairment triggers.[30] Indeed, it is likely that the substantial number of wire centers in the six MSAs where UNEs are *already* no longer available exhibit the highest percentage special access purchases.

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[29] *See e.g. NY MSA Declaration* ¶ 46 ("These data also show that there are one or more known competing fiber providers in at least **[proprietary begin] [proprietary end]** percent of the **[proprietary begin] [proprietary end]** wire centers in the New York MSA that account for **[proprietary begin] [proprietary end]** percent of Verizon's high capacity special access revenues.").

[30] *See TRRO* n.477 ("Despite our concerns about the incumbent LEC special access data, we note that even those data indicate that most competitive activity is focused in a limited percentage of wire centers. To put this figure in context, we note that Verizon maintains that nearly 80% of the demand for special access services is concentrated in 8% of its wire centers.... Consequently, even if we relied on tariffed incumbent LEC services to evaluate impairment in

Finally, even if all of the maps and other data submitted by Verizon were relevant to the ability of competitors to provide local service, the FCC has already held that that sort of data does not justify eliminating unbundling on an *MSA-wide* basis. Faced with similar RBOC supplied data in the *TRRO*, the FCC concluded that, even "if we were even able to surmount the weaknesses" with respect to the RBOCs' data, "they do not indicate sufficiently pervasive deployment to justify an MSA-wide bar on unbundling." *TRRO* ¶ 189. Indeed, **[proprietary begin] [proprietary end]**. In any case, Verizon's maps cannot serve as a basis for eliminating unbundling in the MSAs in question in whole or in part.

In sum, it is clear that intramodal competitors have been and continue to be unable to efficiently deploy the DS-0, DS-1 or individual DS-3 loops or the DS-1 or DS-3 transport facilities for which Verizon seeks forbearance from unbundling obligations. These kinds of carriers do not in any material way contribute to the kind of "extensive" facilities-based retail or facilities-based wholesale competition that is a necessary prerequisite for meeting the Section 10 forbearance test for UNEs.

C. Verizon Has Not, And Cannot, Demonstrate That Cable Competitors Offer Sufficient Competitive Discipline In The Provision Of DS-0, DS-1 Or DS-3 Based Services In Any Wire Center In Any Of The Urban Areas At Issue.

Verizon relies on purported evidence that some cable companies offer some services to some business customers in an attempt to show that *all* cable companies throughout *all* six MSAs are "ready, willing and able" to provide services to all types of businesses throughout all six MSAs. Verizon's only evidence supporting this conclusion is a set of maps showing cable

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the relevant markets...we anticipate that such data likely would lead us to identify many of the same wire center service areas that we identify here as areas where competitive LECs are not impaired. Specifically, the analysis we adopt here denies unbundling in wire center service areas exhibiting high potential revenues – the same wire centers, according to the BOCs' advocacy, most likely to offer tariffed alternatives to competitive LECs.").

franchise areas throughout each of the six MSAs along with statements from the cable companies' websites (that generally do not differentiate among offerings available in different geographic areas) stating that cable companies serve business customers. *See, e.g., NY MSA Declaration* ¶¶ 51-55 & *Ex.* 3. Verizon implies that if a cable company advertises services to businesses on a national basis, then *ipso facto,* that "all of the customers capable of being served by [the ILEC] from [a] wire center will benefit from competitive rates." *Omaha Order* ¶ 69. This is simply not so.

1. Verizon Provides No Basis For Concluding That Cable Modem Competition Obviates The Need For The Unbundled DS-0 Loops Needed To Serve Very Small Business Customers.

As discussed at length above, certain criteria must be met before competition from cable companies justifies the elimination of unbundling requirements in a particular product market. To justify removal of DS-0 unbundling obligations, Verizon must show, at the least, that (1) the cable company's network "covers" the wire center in question and is capable of providing the full suite of services that Verizon provides to small businesses over DS-0 loops; (2) the cable company has achieved substantial success in winning retail market share by providing DS-0 equivalent services over its own network; and (3) the presence of facilities-based competitors in addition to the cable company give Verizon "very strong market incentives" to offer DS-0 loops at wholesale on terms and conditions that permit viable retail competition in the absence of DS-0 UNE loops. Verizon has not shown that any of these criteria has been met in any wire center in any of the six markets at issue.

Verizon fails the first criterion because it has provided no data with respect to the actual coverage of cable company networks capable of providing services that are substitute for those that Verizon provides over DS-0 loops. Moreover, there is good reason to doubt that such data would support the denial of the petitions with regard to DS-0 loop unbundling. The FCC has

found that cable companies are "focusing their marketing" of business services on business customers that are "near [their] residential network[s]." *TRRO* ¶ 193. Moreover, as GCI has explained an upgraded cable plant alone is not, by itself, sufficient to enable a cable operator to provide all the DS-0 services demanded by small businesses.[31] Verizon has provided little indication of the capabilities of the cable networks in its markets, and it has provided no data on the extent to which particular network capabilities are available in particular wire centers in each MSA. At most, it is unknowable where and to what extent cable competitors are capable of providing the full suite of DS-0-based services to small business customers.

Verizon fails the second criterion because it has provided no evidence of cable company success in winning small business customers in the six MSAs at issue. Verizon only provides a sampling of the services advertised by cable companies to small businesses, often on a national basis. The fact that a company may offer a service nationally, or even on a market-by-market basis, has no bearing on whether the company has had any success in actually gaining retail market share.

Verizon has provided the number of business E911 listings by cable company and by MSA (*see, e.g., NY MSA Declaration* ¶ 52), but such data is not probative. As a threshold matter, the Commission should disregard all such data as it was obtained in violation of law and customer privacy rights.[32] Even if the Commission were to consider such data, it should be

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[31] *See Letter of John T. Nakahata et al.*, Counsel, GCI, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, at 6 (Nov. 14, 2006) ("Even assuming its cable facilities enter a building with small business customers, GCI's [phone service technology provided over HFC] is currently incompatible with a number of common small business applications, including multiline or directory number hunt capability, ground start or wink start trunk PBX/Key systems, and many alarm systems.") ("*GCI Nov. 14 ex parte*").

[32] *See e.g.*, Comments of Cox Communications Inc. on Motion to Compel Disclosure and Motion to Dismiss, WC Dkt. No. 06-172 (filed Oct. 30, 2006) (arguing that the use of E911 data by

given no weight. The data are not disaggregated by wire center. In addition, E911 data do not demonstrate the extent to which small businesses are able to and actually are purchasing broadband (cable modem service) from the cable company.

Finally, Verizon fails the third criterion because it has not shown why it would have "very strong market incentives" to offer DS-0 facilities at wholesale on terms and conditions that support efficient retail competition in the absence of a regulatory compulsion to do so. It has not even claimed that it will maintain rates that would permit retail competition from multiple providers to remain viable. If Qwest has not offered reasonable rates for "Section 271" UNE DS-1s (discussed above), there is no reason to believe that Verizon's incentives will be any different with respect to deregulated DS-0 facilities in its markets. In fact, given the absence of any facilities-based competitors in the small business market other than cable companies (and even the extent of cable competition unknowable), it is likely that Verizon would have even less incentive to provide wholesale access to DS-0 loops than Qwest has with regard to DS-1 loops in Omaha.

Nor could the Commission rely on a cable company's provision of DS-0 equivalent services over its HFC network as the basis for a prediction that other competitors could offer such services over their own facilities. As mentioned, the Commission has correctly concluded that such inferences are inappropriate where the competitor that has deployed its own facilities in a market in which it benefited from advantages that are "unique" among non-ILECs. This is certainly the case with cable companies, since their legacy position in the video market has

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Verizon violates interconnection agreements); Reply Comments of Time Warner Telecom *et al.*, WC Dkt. No. 06-172 (filed Nov. 6, 2006) (arguing that Verizon has used data in this proceeding from the Verizon/MCI merger order in violation of the protective order in that proceeding).

allowed them to sink the investment in loops needed to serve mass market customers and to benefit from economies of scope that are simply unavailable to other competitors.

In the absence of appropriate regulation or incentives to sell their facilities at wholesale, it is probable that, at best, Verizon and cable operators would be the only two competitors in the provision of services to small businesses with Verizon retaining a now unregulated monopoly over the wholesale market. In those markets where cable companies' networks are not capable of providing the full suite of DS-0 equivalent services demanded by small businesses, Verizon would hold a monopoly over the retail market in those areas as well. Markets such as these simply cannot meet the Section 10 forbearance standard.[33]

2. Verizon Provides No Basis For Concluding Cable Competitors Provide Meaningful Competition In The Provision Of DS-1 Or DS-3 Services.

While there is little support for Verizon's assertion that cable competition justifies the elimination of DS-0 loops needed to serve small businesses, there is even less support for its similar claim with regard to DS-1 or DS-3 loops or transport. *First*, the FCC has concluded numerous times that cable companies' network location and architecture prevent them from providing DS-1 or DS-3 service on a widespread basis. In the *TRO*, the Commission determined that HFC networks generally do not serve businesses (*i.e.*, provide services such as DS-1s or DS-3s) and that "[t]he cable companies have remained focused on mass market, largely residential service consistent with their historic residential network footprints." *TRO* ¶ 52. In the *TRRO*, the Commission concluded that cable companies focus on selling cable modem services to

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[33] *Cf.* Kevin Martin, Chairman, FCC, Remarks at the Georgetown University McDonough School of Business's Center for Business and Public Policy (Nov. 30, 2006) ("Our ultimate goal however, is for consumers to be able to choose from among a multiplicity of broadband service providers, rather than just one or two.").

"home offices or very small stand-alone businesses, neither of which typically requires high-capacity [DS-1 or DS-3] loop facilities." *TRRO* ¶ 193. At most, these services are substitutes for DS-0-based services.

Most businesses have thus far apparently viewed cable modem service as insufficient for their needs, because "bandwidth, security, and other technical limitations of cable modem service render it an imperfect substitute for service provided over DS-1 loops." *Id.* In addition, the absence of cross elasticity of demand between cable modem service and DS-1 or DS-3 wireline broadband transmission facilities indicates that they are not substitutes.[34]

All of these conclusions have recently been reiterated by GCI, itself a cable company, in the docket concerning forbearance from UNE regulation in the Anchorage Alaska study area. The record in that proceeding conclusively showed that neither GCI nor any other cable company can serve enterprise customers with its HFC plant. As GCI has repeatedly explained, "existing cable technology does not yet permit GCI to provide reliable or economical large-scale DS-1 level services to medium and large business customers."[35] As a result, GCI can only serve enterprise customers in Anchorage with its fiber plant, which is much less extensive than its HFC plant. Moreover, as explained in footnote 4, *supra*, the Commission essentially agreed with GCI that these limitations preclude GCI from providing a meaningful competitive alternative to the incumbent LEC in Anchorage.

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[34] *See TRRO* ¶ 193 ("Commenters also note that businesses that do require DS-1 loops are willing to pay significantly more for them than the cost of a cable modem connection, which also indicates that the two are not interchangeable. Finally, at least two competitors maintain that, based on their internal data, they rarely lose enterprise customers to cable providers.").

[35] *See GCI Nov. 14 ex parte* at 9. *See also* Letter of John T. Nakahata, Counsel, GCI, to Marlene H. Dortch; Secretary, FCC, WC Dkt. No. 05-281, at 26-30 (filed July 3, 2006) ("*GCI July 3 ex parte*"); Declaration of Dennis Hardman; attached to *GCI July 3 ex parte*; Declaration of Gene Strid, attached to *GCI July 3 ex parte*.

It is also worth noting that cable companies are unlikely to be able to commit to Service Level Agreements, or SLAs, when providing service over their HFC network to business customers. The Joint Commenters have found that offering an SLA is often a necessary prerequisite to serving a medium or large business customer.[36] Cable companies' likely inability to offer SLAs appears to pose a major barrier to serving medium and large business customers over HFC networks.

A review of the products advertised by cable companies in the six markets in which Verizon is seeking forbearance further reinforces the FCC's prior conclusions that HFC-based services are only capable (when they are actually upgraded and cover the relevant geographic area) of serving the smallest businesses and that only fiber-based services are capable of satisfying the demands of enterprise customers. Some of these products are summarized below:

- Comcast
  - Comcast's highest speed HFC service provides service at 1 Mbps to 8 Mbps, while "actual speeds may vary and are not guaranteed."[37] The terms and conditions of Comcast's Business Cable Modem Service states that "Comcast makes no representation regarding the speed of the service other than the placement by Comcast of maximum speeds on Services Ordered. Service speeds are approximate and burstable speeds only. Speeds may vary and be slower than the customer expects at times."[38]

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[36] As defined by Newton's, an SLA is "an agreement between a user and a service provider, defining the nature of the service provided and establishing a set of metrics....to be used to measure the level of service provided measured against the agreed level of service...The SLA also typically establishes trouble-reporting procedures, escalation procedures, penalties for not meeting the level of service demanded -- typically refunds to users." *Newton's Telecom Dictionary* 739 (CMP Books 20th ed. 2004).

[37] *See* Comcast Corp., *Comcast Workplace, at* http://www.comcast.com/business/workplaceFeatures.html.

[38] *See* Comcast Corp., *Comcast Workplace, General Terms and Conditions,* Art. 2.2, *available at* http://www.comcast.com/business/legal/Workplace%20Terms%20and%20Conditions%20081006%20FINAL.pdf.

- By contrast, Comcast's fiber-based Ethernet Service provides traffic prioritization between different applications as well as "99.97% network availability."[39]

➢ Cox

- Cox's business class cable modem service for "small business" does not guarantee availability or bandwidth. A disclaimer on its website states: "Actual modem speeds vary. Number of users and network management needs may require Cox to modify upstream and/or downstream speeds. Cox cannot guarantee uninterrupted or error-free Internet service."[40]

- By Contrast, Cox's "Optical Internet" fiber based service offers speeds from T-1 to "Gigabit or higher."[41] SLA's are available to guarantee packet-loss and latency.

➢ Cablevision

- Cablevision's HFC service is "[f]or smaller businesses requiring high speed Internet access for four or fewer users."[42] Cablevision compares its HFC service and calling plan to the "Verizon Freedom for Business" package[43] which provides a combined local/LD plan along with ADSL service.[44]

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[39] *See* Comcast Corp., *Enterprise Network Service*, at http://www.comcastcommercial.com/index.php?option=content&task=view&id=8&Itemid=37.

[40] *See* Cox Communications, Inc., *Cox Business Internet, at* http://www.coxbusiness.com/products/data/businessinternet.html.

[41] *See* Cox Communications, Inc., *Cox Optical Internet, at* http://www.coxbusiness.com/pdfs/cox_optical.pdf

[42] *See* Cablevision Systems Corp., *Business Class Optimum Online, at* http://www.cablevision.com/index.jhtml?pageType=cc_ool.

[43] *See* Cablevision Systems Corp., *Optimum, Compare and Take Control of Your Communications Costs, at* http://www.optimum.com/business/ool/compare.jsp.

[44] Like HFC-based products, Verizon's ADSL service provides an asymmetrical service "up to" 3 Mbps downstream and 786k upstream and "[t]hroughput speeds vary and speeds and uninterrupted service [are] not guaranteed." *See* Verizon Comm., Inc., *Verizon Freedom for Business with DSL*, at http://www.22.verizon.com. For this reason, DSL, like HFC-based services, generally do not offer robust service level agreements. *See* Earthlink, Inc., *Earthlink Business High Speed, at* http://www.earthlink.net/biz/highspeed/enterprise/sla/ (specifically

- Cablevision makes a clear distinction between its fiber-based and HFC-based products for businesses: "Optimum Lightpath is going after medium and large-sized enterprises and Optimum Voice is going after smaller businesses." [45]

- The price differential between its HFC and fiber-based product clearly indicates that these offerings belong in different product markets. While its 10/2 Mbps HFC product costs only $49.95[46], a 10 Mbps symmetrical fiber connection costs $1,300 per month.[47] Clearly, such a large price difference for similar bandwidth indicates that Cablevision's HFC and fiber-based products are not in the same product market.

- Cablevision's Lightpath.net fiber-based Ethernet service provides service level commitments, 99.99% network availability and a "SONET-like" carrier class recovery rate of <50 ms.[48]

➢ Time Warner Cable

- The disclaimer on TWC's New York website for its business class HFC product states that "All speeds are approximate; no throughput is guaranteed". [49]

- By contrast, its fiber-based "Ethernet Internet Access service" for the New York market provides for "specific and well defined service level agreements. There is a guaranteed level of service between the clients' location and TWC Internet Edge Router, along with other service

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excluding ADSL and SDSL service from Earthlink's SLA that applies to its DS-1 and DS-3 based services).

[45] Cablevision Systems Corp., *Cablevision Systems Q2 2006 Earnings Conference Call Transcript (CVC)*, at 8 (Aug. 8, 2006) (quoting Tom Rutledge, Cablevision Chief Operating Officer), *available at* http://media.seekingalpha.com/article/15172.

[46] *See* Cablevision Systems Corp., *Optimum Pricing, at* http://www.optimum.com/business/ool/pricing.jsp.

[47] *See* Cablevision Systems Corp., *Optimum Lightpath, E-Line Pricing, at* http://www.optimumlightpath.com/Interior214.html.

[48] *See* Cablevision Systems Corp., *Optimum Lightpath, E-Line, at* http://www.optimumlightpath.com/Interior212.html.

[49] *See Time Warner Cable, Business Services - Business Class, at* http://www.twcnyc.com/index2.bus.cfm?c=new_bus/roadrunner#express.

parameters including restoration times, end-to-end latency across TWC network and packet delivery to the Edge Router."[50]

- RCN
  - Its highest speed HFC product is designed for "small businesses" and its highest speed its 20 Mbps downstream and 2 Mbps upstream.[51]
  - By contrast, its fiber-based Ethernet service provides SLAs and "99.99 % network availability" from 1 Mbps of symmetrical bandwidth to 1 Gbps.[52]

To the extent that cable companies are providing DS-1 or DS-3 services, the available evidence indicates that they do so via traditional fiber loop facilities, not their HFC networks.[53] Because their fiber network architectures are similar to intramodal competitors' networks, cable companies likely face many of the same barriers when deploying such loops as intramodal competitors face.[54] Cable companies generally deploy their fiber transport networks in rings running through the densest portions of urban areas. From these fiber rings, they seek to deploy fiber laterals to individual end-user customers where the revenue opportunities compensate for the cost of construction. As RCN explains, its addressable market of "near net" buildings

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[50] *See Time Warner Cable, Business Services - Private Networks, at* http://www.twcnyc.com/index2.bus.cfm?c=new_bus/privatenetwork.

[51] *See* RCN Corp., *Small Business, at* http://www.rcn.com/smallbusiness/internet.php.

[52] *See* RCN Corp., *Business Solutions - Services, at* http://www.rcnbusinesssolutions.com/services/network_services/ethernet_transport.php.

[53] For example, the Commission rejected Qwest's assertion that it had lost customers to "intermodal competition" from cable companies because "those losses are to the circuit-switched telephony service offered by Cox's competitive LEC affiliate [which relies on traditional fiber-based loops], rather than to its cable operation." *TRRO* ¶ 193, n.514.

[54] *See id.* ¶ 95 (noting that fiber-based competition from cable companies is captured by the FCC's collocation-based impairment standard). Just like traditional wireline carriers, cable companies, "may collocate in order to access incumbent LEC loops, to interconnect with the incumbent LEC or other carriers, or to provide wholesale transmission services." *Id.* n.270.

consists of only those buildings within 500 feet of its fiber transport network.[55] Moreover, laterals can only be connected to "splice points" on the transport network, which are generally located every 2,000 feet. *See TRRO* n. 226.

The map of Time Warner Cable's ("TWC's") fiber network in lower Manhattan submitted into the record by Verizon illustrates the apparent limits of cable fiber loop deployment. TWC's fiber transport facilities depicted on the Verizon map are constructed via four interlocking rings that are at their densest in lower Manhattan where the demand for enterprise level services is high. Yet, up to a mile separates the routes of this network, making it unlikely that TWC can economically deploy fiber laterals (with a likely range of about 500 feet and subject to the likely distribution of splice points every 2,000 feet) to most portions of the city. The map only shows a single ring throughout Brooklyn and Queens, making lateral construction in those boroughs even more difficult and unlikely. In fact, the map attached hereto as Exhibit B indicates that **[proprietary begin] [proprietary end]** percent of its customers on-net in the NY MSA because of the uniquely high costs of serving the New York market discussed above. Given that **[proprietary begin]**[56] **[proprietary end]**

In light of the apparent limitations of HFC networks and the substantial barriers to fiber loop deployment, market analysts have indicated that cable companies have been slow even to attempt to serve medium and large businesses. Where they have begun to serve businesses, cable companies are focusing on serving only very small businesses. For example, one analyst

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[55] *See* RCN Corp., *Business Solutions - About Us, at* http://www.rcnbusinesssolutions.com/about/index.php.

[56] GeoResults does track the buildings that cable companies' have lit with fiber. Indeed, Cablevision's Lightpath subsidiary is listed as having **[proprietary begin] [proprietary end]** lit buildings in New York City.